IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. .....

MYRA PAGE WIREN,
Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION

I

Jurisdiction

1. The final order on the decision to be reviewed was entered on May 13, 1942.

2. It is respectfully submitted that the jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; 43 Stats. 938; 28 U. S. C. A. 347.

II

Statement of the Case

A statement appears under heading "A" in the Petition and in the interest of brevity is not repeated here.

III

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in finding and holding that Judge Manton was not disqualified to hear this appeal.

IV

ARGUMENT

Summary of the Argument

A

The decision of the Circuit Court of Appeals that the facts set forth by petitioner on this motion showing financial consideration to Judge Manton for his decision in this case did not constitute disqualification is erroneous and contrary to the established principles of law and the court has decided an important question of general law which is untenable and in conflict with the weight of authority and has departed so far from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

B

Cases in which the opinion of the Circuit Court of Appeals has been unanimous have been reopened because of Judge Manton's disqualification. The present case was affirmed without opinion.

C

The fact that the decision of the Circuit Court of Appeals was an affirmation of the decision of the District Court is not a bar to the granting of a reargument of the appeal.

D

The petitioner is not guilty of laches.

E

The voluminous discussion of substantive facts contained in the answering affidavit in opposition have nothing to do with the issues involved on this motion.

F

The petitioner is not enjoined by the order of the District Court in the bankruptcy proceedings.

POINT I

With Respect to "A" of the Summary of the Argument

The evidence that financial consideration was flowing to Judge Manton in this case is overwhelming.

The answering affidavits do not even attempt to deny, but admit, that Mr. Lasker had and controlled all of the advertising business of Paramount Publix Corporation (later Paramount Pictures, Inc.) from 1931 to 1937 which included the time when the petitioner's appeal was pending, heard and decided in the Circuit Court of Appeals (R. p. 25—foot). Mr. Lasker's advertising company of Lord & Thomas with New York and Chicago offices, which he testified he owned entirely as shown above, had as one of its chief enterprises the business of Paramount and its many subsidiary companies including production, enterprise and chain theatre companies.

The answering affidavits do not deny that Mr. Lasker's entire chain of de luxe Chicago theatres was taken over by Paramount in 1926 or that it was recorded in the New York Times for October 31, 1931 on its financial sheet on page 25 (R. fol. 20), that Mr. Lasker was buying heavily into Paramount and that he had been chosen as a director

of the company, which office it is admitted that he continued to hold until after the commencement of the equity reorganization proceedings of Paramount in 1933 (R. p. 32).

The answering affidavits do not deny, but admit, that Paramount has refused to allow petitioner to examine the lists of stockholders of Paramount (R. p. 50), submitting merely affidavits by an officer of Paramount that Mr. Lasker, at a time prior to the period in question, held only a few shares in his own name, although petitioner claims that, just as the $250,000 loan by Mr. Lasker to Judge Manton was not made in Mr. Lasker's own name but in the name of a company owned by him, so his stock would be held in the name of a nominee. The only attempt of Paramount to answer this contention is the affidavit of an officer of Paramount that Mr. Lasker *personally* in his *own name* held very little stock, without attempting to deny petitioner's contention that Mr. Lasker held stock in the name of a nominee and in spite of the contention that Paramount should supply an affidavit by Mr. Lasker on this matter as Mr. Lasker was available in New York City at the time of this motion and a proper person to give such information (R. p. 43). Paramount's inadequate affidavit therefore is of no significance and palpably intended to mislead the court.

There is not the slightest reason for such refusal to examine the stock lists except the obvious fact *that an examination of the said stock lists would disclose the ownership of such stock by some nominee of Mr. Lasker.* This conclusion is rendered inevitable by the fact that the defendants' own affidavits do not deny that some other nominee owned such stock; their denial is limited to the bald assertion that Mr. Lasker himself in the period in question was not a stockholder of record except to the extent of a few shares. The supplementary affidavit of Mr. Louis Phillips, attorney for Paramount, in an attempt to support his con-

tention, states that he has had the stock lists searched for the period from April 4, 1932 to May 10, 1935 inclusive and that they do not show any ownership by Lord & Thomas (R. p. 50) but the affidavit of Norman Collyer, Assistant Secretary of Paramount states, in contradiction to this, that there were no lists kept between April 4, 1932 and May 10, 1935 (R. pp. 51-52). It is not denied by either of them that Mr. Lasker held stock in the name of some other nominee, for which petitioner wishes to make the search. The report of the financial department of the New York Times for October 31, 1931 (R. fol. 20), handed up by petitioner to the Circuit Court of Appeals at the argument, sets forth that "advertising officials buy heavily into Paramount"—and that also Mr. Lasker was being made a director, and that "Mr. Hertz had purchased a large amount of the stock of the Company in the open marked in company with Mr. Wrigley *and Mr. Lasker*". (Italics ours.)

It is palpable that defendants sought to convey that Mr. Lasker, directly or indirectly, owned merely a few shares of Paramount stock; otherwise their affidavits in this regard would have no significance whatsoever. Yet, as above stated, they failed to produce an affidavit by Mr. Lasker *as to his actual beneficial holdings* of such stock; they fail to deny that Mr. Lasker held stock *in the name of a nominee,* and *they thwart the petitioner's efforts to ascertain the actual facts in this regard by an examination of the very stock lists to which they themselves* have referred.

It is admitted that Paramount had expended large sums of money in preparing to make the picture and that, during the time that petitioner's suit was pending, Mr. Lasker was a director of Paramount (R. p. 32) in addition to handling all of its advertising business (R. p. 25—foot) but their contention is that, after the commencement of petitioner's suit, Paramount (as also Shuberts) went into bankruptcy, and that thereafter Mr. Lasker ceased to be a director. But

they do not deny, on the contrary, they *admit that right on through the bankruptcy proceedings and until 1937* (R. p. 25—foot) (long after the decision of petitioner's appeal by Judge Manton in 1934), *Mr. Lasker continued to handle all of the advertising business of Paramount, with its many subsidiary companies,* which involved a very large amount of money annually. Notwithstanding this, Paramount would try to have it believed that Mr. Lasker did not have much financial interest in Paramount while petitioner's appeal was pending before Judge Manton and when he decided it in Paramount's favor.

The answering affidavits do not deny that from this man who was so deeply involved financially in the affairs of Paramount Publix Corporation and all of its production and theatre chain companies, in New York, Chicago and elsewhere, Judge Manton borrowed a quarter of a million dollars.

The answering affidavits do not deny that while the petitioner's case was pending before Judge Manton, Mr. Lasker was pressing Judge Manton for repayment of this large loan which Judge Manton was unable to pay (R. p. 5).

Then Judge Manton, while thus inextricably bound to Mr. Lasker and his interests in Paramount, decided petitioner's case in favor of Paramount.

Thereafter Judge Manton was not pressed for payment and no part of said loan of $250,000 has ever been paid or any interest thereon. Yet Judge Manton, in 1935, when examined under oath by the Bank of United States, did not list that $250,000 as one of his debts (R. p. 5).

The answering affidavits do not deny that Judge Manton's agent Fallon was an important factor in and closely identified with the motion picture and theatrical business during the time that petitioner's appeal was pending, and Judge Manton admitted an increase in his financial condition to the extent of a million and a quarter dollars within a few months after deciding petitioner's case involv-

ing a very successful play and motion picture which Paramount does not deny made several million dollars, and he did not give the government any explanation aside from such statements as to thousands of dollars being brought to him by a man in the theatrical business whom he only vaguely identified (R. p. 7).

Petitioner respectfully submits that Judge Manton did not decide petitioner's appeal on the merits and that his decision was improperly influenced by financial consideration, and, furthermore, that Judge Manton was not free to decide fairly and impartially, without prejudice or bias, a very important case against Paramount and these defendants involving several millions of dollars; that he was not qualified to preside over the court which was hearing this case; that petitioner's case was not heard by a disinterested court; that in legal effect no hearing was had by petitioner; that the Circuit Court of Appeals was not properly constituted at the time that it heard the petitioner's case, and that the decision and decree of said Court were, by virtue thereof, void in their inception.

It has been held that no decree was rendered by a duly constituted and completely disinterested court and that, in legal effect, no hearing was had by the plaintiff, and that therefore the decrees were void and a nullity, *even in many cases where there was merely technical disqualification and there had been no actual corrupt participation in the decision.* (See *Case* v. *Hoffman,* 100 Wis. 314; *People* v. *Connor,* 142 N. Y. 130; *Duryea* v. *Traphagen,* 84 N. Y. 652; *Seaward* v. *Tasker,* 143 N. Y. S. 257; *Davis* v. *Seaward,* 85 Misc. 210, affd. 171 A. D. 963; *Regina* v. *Henley* (1892) 1 Q. B. 504; *Reg.* v. *Justices of Hertfordshire* (1845) 6 Q. B. 753; *Reg.* v. *Cheltenham* (1841) 1 Q. B. 467.)

The importance of maintaining a fair and impartial judiciary, free from the slightest shadow or question, is recognized by the Judicial Code, Sec. 21 (36 Stat. at L. 1090, Chap. 231, U. S. C. Title 28, Sec. 25), which provides

for the disqualification of a district court judge, and this was invoked by this Court in *Berger* v. *United States*, 255 U. S. 22, 41 S. C. R. 230.

As Judge Knox said in the Levy disbarment proceedings in connection with the Manton affair: "A trained lawyer that he is he should have known that Judge Manton's mind would be warped and biased by such a loan". And "Don't you think it is only human nature for a person on whose behalf money has been spent, to have a feeling of gratitude and even obligation? * * * It might affect a judge's judgment * * *".

POINT II

Cases in which the opinion of the Circuit Court of Appeals has been unanimous have been reopened because of Judge Manton's disqualification. The present case was affirmed without opinion.

In two cases which have been re-opened by the Circuit Court of Appeals on the ground that it was reasonable to believe that there was corruption between Judge Manton and the defendants, namely, *Electric Auto Lite* v. *H. & D. Manufacturing Co.* (109 Fed. Rep. (2nd) 566), and *The Matter of 671 Prospect Ave. Holding Corporation, Bankrupt* (105 Fed. Rep. (2nd) 960), the decisions of that court had been unanimous. (97 Fed. Rep. (2nd) 513) and (78 Fed. Rep. (2nd) 700.) In those cases the Court wrote an opinion, whereas in the petitioner's case it was affirmed without opinion.

POINT III

The fact that the decision of the Circuit Court of Appeals was an affirmation of the decision of the District Court is not a bar to the granting of a reargument of the appeal.

In cases in which Judge Manton has admitted that he sold his decisions (*Cinema Patents Co. Inc.* v. *Warner Bros. Pictures Inc.*, and *Cinema Patents Co. Inc.* v. *Duplex Motion Pictures Industries, Inc.*, supra) his decisions (with Judges Swan and Chase) were unanimous affirmations of decisions by the lower court dismissing the complaints (66 Fed. (2nd) 744).

POINT IV

The petitioner is not guilty of laches.

It is respectfully submitted that, under all the circumstances hereinafter set forth, petitioner acted with all diligence in making the motion for a reargument of the appeal. The reasons that the motion was not made before are as follows: When petitioner learned, after the trial of Judge Manton, of the facts as to Judge Manton's great financial obligations to Mr. Lasker and to the motion picture industry, the petitioner had been, and was for a long time thereafter, very dangerously ill with heart trouble, having been confined in a hospital for months and for months after leaving the hospital she was in the care of trained nurses, and the doctors had said that she could not live, all due in large measure to the strain, suffering and anguish caused by the theft of her literary work, the subject of this lawsuit, and the long and difficult struggle which she went through in trying to have her day in court (R. pp. 3, 4, 46). The petitioner is the sister of the attorney herein, and during her very long and serious illness he was prevented in many ways from giving his attention to this case. As the petitioner was so ill it did not seem useful at that time to commence proceedings for a rehearing, and he felt that any time, money and effort that he could expend, he should devote in trying in every way he could to aid his sister's recovery. He even found it necessary to accompany the petitioner to Switzerland where she had been under the care

of Swiss physicians that she might try to regain her health. As soon, however, as there was expectation of her recovery, a start was made to secure evidence, and he obtained information which convinced him, and others with whom he consulted, that with proper investigation specific evidence could be secured proving corruption with respect to Judge Manton's decision in this case. Thereafter, petitioner's counsel conducted extensive investigations and employed assistants to obtain such evidence. In addition to the facts set forth in the affidavit in support of the motion, he finally succeeded in obtaining information as to persons who, he was informed, had knowledge concerning and can testify as to additional evidence of payments to Judge Manton, for which he had been diligently seeking, and he requested the court for subpoenas for the examination of certain persons and records (R. p. 12) but this request was not acted upon by the court. Petitioner respectfully submits that evidence of this kind is not easily obtainable and that it necessarily took much time, effort and expense, and that petitioner and her counsel have been just as diligent as it was possible to be under all of the circumstances.

The petitioner was compelled to return from Europe in the Fall of 1939 because of the outbreak of the war and it was necessary for her counsel to see the State Department in Washington and have them cable for passage home for her and for special accommodations because of her condition and the steamship company cabled also. The petitioner's illness lasted from 1935 to last Fall—1941. As late as last September, her heart condition was so bad and she was in such a state of collapse that when a physician was called he advised immediate hospitalization. With treatment and rest she finally has improved (R. pp. 3, 4, 46).

POINT V

The voluminous discussion of substantive facts of the plagiarism suit contained in the answering affidavit in opposition have nothing to do with the issues involved on this motion.

The answering affidavits of defendants contain a voluminous discussion of the substantive facts in this litigation as well as various proceedings therein. Many of said statements are contrary to the fact, but, it is respectfully submitted that the sole issue involved in this proceeding is the question of Judge Manton's disqualification.

POINT VI

The petitioner is not enjoined by the order of the District Court in the bankruptcy proceedings.

Paramount, in its opposing affidavit, resorts to a long argument trying to show that this motion is enjoined by the restraining order in bankruptcy of the District Court. The Circuit Court of Appeals, in denying this motion, did not refer to this contention of Paramount. The order in bankruptcy does not apply to this case for the reason that this case, among others pending at the time of the bankruptcy, was specifically excluded from the operation of the restraining order by an order of Judge Alfred C. Coxe which modified the restraining order and provided that this action should "continue to final judgment". (R. p. 47.) A similar order was signed in the Shubert bankruptcy proceedings by Judge Francis G. Coffey (R. p. 47). The order of June 16, 1934, mentioned by Paramount, was issued *after* the argument and decision by Judge Manton of the appeal to the Circuit Court of Appeals.

CONCLUSION

Petitioner merely asks that her appeal be heard by a clearly disinterested Court—the most fundamental right to which every litigant is entitled.

It is therefore respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, and that to such an end, a Writ of Certiorari should be granted and this court should review the decision by the Circuit Court of Appeals for the Second Circuit and vacate the same.

MYRA PAGE WIREN,

By OSCAR B. WIREN,
Attorney for Petitioner.